5-27-2009

Mortensen v. Stewart Title Guar. Co. Appellant's Brief Dckt. 35949

IN THE SUPREME COURT OF THE STATE OF IDAHO

VERNON JERRY MORTENSEN,

Plaintiff/Appellant,

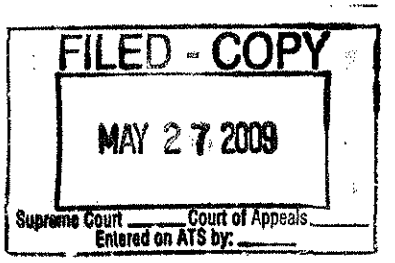
v.

STEWART TITLE GUARANTY COMPANY,

Defendant/Respondent.

Supreme Court No. 35949-2008

APPELLANT'S OPENING BRIEF



APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE LANSING L. HAYNES, PRESIDING DISTRICT JUDGE

Sam Johnson, ISB No. 4777
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Suite 250
Boise, ID 83702

ATTORNEYS FOR
PLAINTIFF-APPELLANT

Todd Reuter, ISB No. 5573
KIRKPATRICK & LOCKHART PRESTON GATES ELLIS , L.L.P.
618 W. Riverside Avenue, Suite 300
Spokane, WA 99201-0602

ATTORNEYS FOR
DEFENDANT-RESPONDENT

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A. Nature of the Case

This case stems from the contractual relationship between a title company, Defendant/Respondent Stewart Title Guaranty Company (hereinafter "Stewart Title") and its insured, Plaintiff/Appellant Vernon Jerry Mortensen (hereinafter "Mortensen"). This appeal is brought by Mortensen from the district court's order granting summary judgment to Stewart Title.

B. Course of Proceedings Below

Mortensen filed his *pro se* Complaint and Demand for Jury Trial on July 2, 2007, in Kootenai County, Idaho. R., Vol. 1, p. 1. It included the following counts: (1) Misrepresentation and Fraud; (2) Punitive Damages; (3) Breach of Contract; (4) Bad Faith; and (5) Emotional Distress. *Id.* Stewart Title filed its Answer to the Complaint on August 6, 2007.

After the pleadings had settled, Stewart Title moved for summary judgment on January 17, 2008. R., Vol. 1, p. 131. Mortensen opposed the motion by lodging a written memorandum (R., Vol. 2, p. 332) and the supporting Affidavit of Plaintiff Vernon Jerry Mortensen (R., Vol. 2, p. 313). The motion was argued and submitted and the district court granted summary judgment in favor of Stewart Title by way of its *Memorandum Opinion and Order In Re: Defendant's Motion for Summary Judgment.* R., Vol. 2, p. 420.

Thereafter, Mortensen filed his motion for reconsideration. R., Vol. 3, p. 505. The district court denied the motion by issuance of its *Memorandum Opinion and Order In Re: Plaintiff's Motion For Reconsideration.* R., Vol. 3, p. 586.

Next, the district court awarded Stewart Title $25,000.00 in attorney fees as the prevailing party in a suit brought by Mortensen that the district court found unreasonable and without foundation. *See Findings and Conclusions In Re: Costs and Attorney Fees.* R., Vol. 3, p. 603. The district court officially entered summary judgment against Mortensen on November 19, 2008. R., Vol. 3, p. 607.

Mortensen timely filed his Notice of Appeal on November 28, 2008. R., Vol. 3, p. 627.

C. Statement of Facts

On or about September 22, 1994, Mortensen purchased a 160 acre parcel of real property situated in Kootenai County from the Peplinskis. *See Mortensen Affidavit, ¶ 2 at R., Vol. 2, p. 314.* In conjunction with the purchase of the 160 acres, Stewart Title issued a policy of title insurance whereby it agreed to insure Mortensen's right of title and access to the 160 acres of land. *See Mortensen Affidavit, ¶ 3 at R., Vol. 2, p. 314.* The access route insured by Stuart Title traversed over property owned by the Akers. At no time does Mortensen recall Stewart Title delivering a copy of the title policy to him. *Id.*

After purchasing the property in 1994, Mortensen regularly and continuously used the aforementioned access route to travel to and from his property. He had used it for personal, recreational, commercial, and agricultural pursuits. Over the years, Mortensen had performed maintenance/repairs and improvements to the access route. *See Mortensen Affidavit, ¶ 4 at R., Vol. 2, p. 314.*

In 2001, Mortensen sold the northern 80 acres of the 160 acre parcel to David and Michelle White. Based upon information and belief, Stewart Title issued a policy of title

insurance to the Whites whereby it agreed to insure the Whites' right of title and access to the 80 acres of land Mortensen sold to them. *See Mortensen Affidavit, ¶ 5 at R., Vol. 2, p. 314.*

Sometime thereafter, Stewart Title recognized the existence of a problem relating to Mortensen's right of access to his property, and the Whites' right of access to the parcel Mortensen deeded to them. *See Mortensen Affidavit, ¶ 6 at R., Vol. 2, p. 314.* Thus, Mr. John Holt, acting on behalf of Stewart Title, contacted Dennis and Sherri Akers (the "Akers") and offered to buy a small parcel of property from them and mentioned that Stewart Title needed the parcel to provide Mortensen legal access and easement to his property and the property Mortensen conveyed to the Whites. According to Mr. Holt's affidavit, he contacted the Akers sometime in late 2001. *See Mortensen Affidavit, ¶ 7 at R., Vol. 2, p. 314.*

Stewart Title however failed and/or refused to divulge to Mortensen in any way that it believed there was an access/easement problem concerning his land, that it had talked to the Akers in an effort to cure the access/easement problem or that it tried to purchase property from Akers to fix the problem. This information was kept secret from Mortensen by Stewart Title. *See Mortensen Affidavit, ¶ 8 at R., Vol. 2, p. 315.*

Once Stewart Title notified the Akers of the access issue, the Akers filed suit against Mortensen for trespass, as well as other claims. This lawsuit was filed on January 10, 2002, in the In The District Court Of The First Judicial District Of The State Of Idaho, In And For The County of Kootenai, Case No. CV-02-222, a true and correct copy of which is appended to the Affidavit of Todd Reuter In Support Of Stewart Title Guaranty's Motion For Summary Judgment. *See Mortensen Affidavit, ¶ 9 at R., Vol. 2, p.*

315. Upon commencement of the Akers suit, Stewart Title first provided the Whites with a defense and thereafter tendered a defense to Mortensen and answered the Akers' Complaint on his behalf. *See Mortensen Affidavit, ¶ 10 at R., Vol. 2, p. 315.*

Mortensen did not find out about the discussion John Holt of Stewart Title had with the Akers or Stewart Title's offer to purchase property from the Akers, or Stewart Title's opinion that the access route across Akers' land was questionable until Mrs. Akers testified about it in open court during the trial in the above referenced matter. This testimony occurred on or about September 11, 2002. *See Mortensen Affidavit, ¶ 11 at R., Vol. 2, p. 315.*

During the pendency of the Akers' lawsuit, a second issue developed over Mortensen's access to the east end of the access route. In an effort to resolve this problem, Stewart Title purchased a small, triangular shaped parcel of property from Ms. Kathryn Baker which was then quitclaimed to the Whites and Mortensen. Stewart Title recorded the Quitclaim Deed and represented to and assured Mortensen that he owned the triangular shaped parcel. Ownership of this triangular shaped parcel however was disputed by the Akers throughout the Akers litigation. During the lawsuit, based upon the representations of ownership made by Stewart Title, the Whites and Mortensen began making improvements to the triangular shaped parcel. *See Mortensen Affidavit, ¶ 12 at R., Vol. 2, p. 316.*

Following a court trial in the Akers suit, the district court held that Mortensen did not have an easement to his property, that he had trespassed by making improvements to the triangular shaped parcel and that he was liable to the Akers for damages for trespass,

emotional distress and punitive damages. *See Mortensen Affidavit, ¶ 13 at R., Vol. 2, p. 316.*

After the decision rendered by the district court in the Akers lawsuit came down, Mr. John Holt of Stewart Title represented to and assured Mortensen that it would assist in appealing the district court's decision. Mr. Holt made these representations over the phone and in writing. In fact, in his letter dated January 24, 2003, Mr. Holt indicated:

> As stated in previous correspondence Stewart's obligation under the Policy is to cure the lack of right of access to or from the land (see Paragraph 9 of the Conditions and Stipulations). Stewart is working to cure the access issue in a diligent manner through the litigation and will continue to do so via the Reconsideration and/or Appeal process.

(Emphasis added). *See Mortensen Affidavit, ¶ 14 at R., Vol. 2, p. 316.* Thereafter, on March 17, 2004, Mr. Holt confirmed Stewart Title remained committed to the appeal:

> Based on the new trial, the post trial briefs and proposed findings and conclusions Reagan/Yost both expressed confidence the Judge would reverse himself and both recommended that we sit tight and wait for the Judge's decision. However, in a worse case scenario if the Judge perpetuates his original findings and conclusions then our course of action will be to file an appeal.

(Emphasis added). *Id.*

Stewart Title's attorney, Mr. Richard W. Mollerup, made similar representations and assurances to Mortensen over the phone and in writing. In fact, in his letter dated February 19, 2003, Mr. Mollerup indicated:

> Stewart Title has provided you with a defense for all claims made [by] Dennis or Sherrie Akers in the lawsuit by retaining Michal Reagan. That agreement to defend was subject to a reservation of rights that Stewart Title may not be liable for damages based on certain allegations in the lawsuit. Stewart Title intends to continue to provide you with a defense to all claims in the lawsuit throughout the

> damage phase of the trial and possible a motion for reconsideration or an appeal to the Idaho Supreme Court.

(Emphasis added). *See Mortensen Affidavit, ¶ 15 at R., Vol. 2, p. 317.* Thereafter, on March 26, 2003, Mr. Mollerup sent Mortensen another letter wherein he ratified Stewart Title's commitment to represent Mortensen on an appeal:

> As you are aware, on March 18th, 2003, Judge Mitchell denied Mr. Reagan's motion for a 54(b) certificate. Therefore, as I am sure Mr. Reagan has told you, no appeal can be filed until after the damage phase of the trial. With regard to your request for a commitment from Stewart to appeal Judge Mitchell's decision, I believe Stewart has already given you that commitment unless the case can be settled earlier.

(Emphasis added). *Id.*

Not long after receiving the above referenced correspondence, Stewart Title changed its position and refused to continue defending the Akers lawsuit and to pursue the appeal of Judge Mitchell's decision. Mortensen was notified of Stewart Title's change in position by way of correspondence dated May 14, 2004. In this correspondence, Mr. Mollerup stated – "Therefore, as a result of this payment, Stewart Title will not prosecute an appeal of the judgment to be entered in the above referenced action, nor will it post a supersedeas bond to stay the execution of the judgment." *See Mortensen Affidavit, ¶ 16 at R., Vol. 2, p. 318.*

As a result of this reversal of fortune, Mortensen has been forced to retain counsel to assist him throughout the appeal and further proceedings in the lawsuit without any assistance, financial or otherwise, from Stewart Title. The lawsuit has lasted over five years, is still on going, and has cost Mortensen hundreds of thousands of dollars since

Stewart Title refused to continue with the defense. *See Mortensen Affidavit, ¶ 17 at R., Vol. 2, p. 318.*

Mortensen relied to his great financial and emotional detriment on the representations made by Stewart Title to protect his right of access to his property. *See Mortensen Affidavit, ¶ 18 at R., Vol. 2, p. 319.*

IV. ISSUES PRESENTED ON APPEAL

A. Did the district court err by granting summary judgment on Mortensen's claim for breach of the title insurance contract?

B. Did the district court err when applying the doctrine of Quasi-Estoppel to the facts presented in this case?

C. Did the district court err in ruling the Mortensen's claim for emotional distress was barred by the statute of limitations contained in Idaho Code § 5-219?

D. Did the district court err when ruling on Mortensen's motion for reconsideration that Mortensen "did not plead a breach of contract for failure of Defendant to perform diligently"?

E. Did the district court err in awarding Stewart Title the sum of $25,000.00 in attorney fees under Idaho Code § 41-1839(4)?

F. Whether Mortensen is entitled to an award of attorney fees on appeal.

V. ARGUMENT

A. Standard of Review on Appeal.

The standard of review on appeal from an order granting summary judgment is the same standard as that used by the district court in ruling on the motion for summary

judgment." *Sorenson v. St. Alphonsus Reg'l Med. Ctr., Inc.,* 141 Idaho 754, 758 (2005).

Thus, the following standard of review applies to all issues on appeal:

> The burden of proving the absence of a material fact rests at all times upon the moving party. *McCoy*, 120 Idaho at 769, 820 P.2d at 364; *Petricevich*, 92 Idaho at 868, 452 P.2d at 365. This burden is onerous because even "circumstantial" evidence can create a genuine issue of material fact. *McCoy,* 120 Idaho at 769, 820 P.2d at 364; *Petricevich,* 92 Idaho at 868, 452 P.2d at 365.

Harris v. State, Dept. of Health & Welfare, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992).

> "[A]ll doubts are to be resolved against the moving party." *Ashley v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979). The motion must be denied "if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable [people] might reach different conclusions." *Id.*

Doe v. Durtschi, 716 P.2d 1238, 1242, 110 Idaho 466, 470 (Idaho 1986).

> ...[T]he Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. *Thompson*, 126 Idaho at 529, 887 P.2d at 1036; *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz*, 119 Idaho at 541, 808 P.2d at 878.

State v. Rubbermaid, Inc., 129 Idaho 353, 356, (Idaho 1996).924 P.2d. 615, 618.

When applying the above standard to the facts of record, summary judgment should never have been granted in this case.

B. The District Court Erred by Granting Summary Judgment on Mortensen's Claim for Breach of the Title Insurance Contract.

The district court erred in ruling as a matter of law on the breach of contract claim. Mortensen raised genuine issues of material fact touching on each element of the claim for breach of contract - (1) the making of the contract, (2) an obligation assumed by Stewart Title, and (3) the breach or failure to meet such obligation. *Thomas v. Cate,* 78 Idaho 29, 31, 296 P.2d 1033 (1956). A breach is defined as: "Failure without legal excuse, to perform any promise which forms the whole or part of the contract . . . ." *Hughes v. Idaho State University,* 122 Idaho 435, 437, 835 P.2d 670 (Ct. App. 1992). Additionally, the concepts of "Good faith and fair dealing are implied obligations of every contract." *Luzar v. Western Sur. Co.,* 107 Idaho 693, 696, 692 P.2d 337 (1984). These implied obligations are breached when action by either party violates, nullifies or significantly impairs any benefit of a contract. *Irwin Rogers Ins. Agency v. Murphy,* 122 Idaho 270, 274, 833 P.2d 128 (Ct. App. 1992).

The analysis is straight forward. The parties acknowledged the making of a contract of title insurance. Stewart Title conceded "Mortensen's policy insured access to the property he was buying." *See Stewart Title's Memo In Support Of Summary Judgment, p. 3 at R., Vol. 1, p. 126; see also the Holt Aff., Ex. 2 at R., Vol. 1, p. 103.* Thus, the only issue is whether a sufficient factual basis exists to support the proposition that Stewart Title breached the contract of insurance. No doubt the record contains ample facts to show breach. Chief among them is the fact that Stewart Title breached its obligation of insuring Mortensen's right of access to his property. The Akers litigation is proof positive of Stewart Title's failure to deliver on its promise of the right of access. In fact, the Akers litigation involves the Akers' claims that Mortensen has trespassed on the very access route Stewart Title insured Mortensen had the right to use by way of an

easement. For this reason alone, the title company's motion for summary judgment on the claim for breach of contract should have been denied by the district court.

Other factual incidents of breach exist as well. As Mortensen has pointed out, Stewart Title recognized a problem in Mortensen's legal right to access the property it insured him access to. However, rather than notify Mortensen, Stewart Title phoned the Akers and notified the Akers about the problem. In doing so, Stewart Title prompted the Akers to file suit against Mortensen for trespass. Interestingly, Mortensen had to learn about Stewart Title's precipitation of the Akers suit by listening to the testimony of Mrs. Akers. It was then and there where Mortensen first learned Stewart Title went behind his back in an effort to cure the access issue. Stewart Title failed miserably in its effort to fix the access problem by notifying the Akers of its existence. To be clear, Mortensen does not argue that Stewart Title had no contractual right to take action in an effort to fix rights insured under the policy. The policy plainly gives Stewart Title such a right:

> The company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as insured, or to prevent or reduce loss or damage to the insured. The company may take any appropriate action under the terms of the policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise it rights under this paragraph, it shall do so diligently.

See Holt Affidavit, Exhibit No. 2 at R., Vol. 1, p. 108. However, according to the express language in the policy, the company has to act diligently, and under the duty of good faith and fair dealing, should not act in secret. If the title company had acted diligently and in good faith, it would have first notified Mortensen about the access problem and developed a plan for fixing the problem in cooperation with Mortensen. Instead, Stewart

Title chose to hide the problem from Mortensen and go behind his back. Obviously a jury could find in favor of Mortensen on the issue of breach of contract. Thus, for this additional reason the motion for summary judgment on the contractually based claim should have been denied.

Moreover, Stewart Title's next attempt at curing the access issue by procuring a quitclaim deed to the triangular shaped parcel from Kathryn Baker failed horribly as well. Here again, a jury could find Stewart Title breached its contractual obligations to act diligently and in good faith. Stewart Title told Mortensen and White it had purchased the small triangle parcel from Kathryn Baker and placed it in their names so they could use it for access, and could make improvements on it; it was theirs. In doing so, Stewart Title made a grave error. As it turned out, the recording and quit claiming of a deed from Ms. Baker meant nothing; she never owned it; the Akers did. Nonetheless, Mortensen and White built an access road across the small triangular parcel believing it was theirs and previously Ms. Baker's as Stewart Title had assured them, when in reality it belonged to the Akers. Mortensen and White were found to have trespassed on that small triangular parcel because they relied on and believed in the expertise of Stewart Title.

Simply put, Stewart Title attempted to buy a property which it believed belonged to Baker, but in truth belonged to the Akers. Stewart Title convinced Mortensen, with a recorded deed from Baker that he owned the property and thus Mortensen used that property for an access road and as a consequence was found by the court to be trespassing on Akers property and the Akers were awarded damages for trespass, emotional distress, and punitive damages.

Stewart Title may have thought it gave Mortensen and White a triangular property and might have thought that Baker was the owner, but Stewart Title was wrong on all counts. The fact that it thought Baker owned the property while in fact the Akers owned it does not change the fact that Mortensen was damaged by the title company's mistakes. Had Stewart Title been diligent, acted fairly and in good faith and taken appropriate action by studying the facts and law there would have been no mix up as to who owned the triangular parcel and Mortensen would not have wound up in the damaging mess in which he found himself.

Finally and perhaps most compellingly, a jury could find a breach to act in good faith from the fact agents and counsel for Stewart Title in one letter after the next promised to effect an appeal if that was necessary to fulfill its contractual obligation to insure Mortensen's right to access his property. A jury could find the reneging of such an obligation to be in breach of the policy.

It was error to grant summary judgment to Stewart Title on the claim for breach of contract.

C. The District Court Erred in its Application of the Doctrine of Quasi-Estoppel to the Facts Presented Here.

The district court properly noted the doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. R., Vol. 2, p. 426; *see*

Atwood v. Smith, 143 Idaho 110, 138 P.3d 310 (2006). However when applying the doctrine of quasi-estoppel, the district court erred by stating as follows:

> Plaintiff can establish a genuine material issue that Defendant took a different position from its original action (i.e., defending first and later indemnifying), but there is no evidence to establish that this was an unconscionable change in position given that those options were expressly provided for in the insurance contract.

Id. (emphasis added).

First, based upon the record, Stewart Title has not shown it delivered the policy to Mortensen. In fact, Mortensen testified he did not recall receiving a copy (*Mortensen Affidavit, p. 2, ¶ 3 at R., Vol. 2, p. 314*), and Stewart Title has not presented any facts to the contrary. Of course, the issue of whether the policy was delivered to Mortensen speaks directly to whether Stewart Title's change of position was unconscionable. If Stewart Title never provided Mortensen the policy, then its act of relying on the policy to justify such a drastic change of position clearly amounts to unconscionability.

However, even when assuming for the sake of argument that Stewart Title delivered the policy to Mortensen, a genuine issue of fact still remains as to whether Stewart Title acted unconscionably. The record plainly demonstrates that Stewart Title sent a series of letters, promising over and over again, to pursue the *Akers* litigation on appeal on behalf of Mortensen. The March 26, 2003, correspondence from Mr. Mollerup punctuates the unequivocal nature of Stewart Title's promise to pursue the appeal:

> With regard to your request for a commitment from Stewart to appeal Judge Mitchell's decision, I believe Stewart has already given you that commitment unless the case can be settled earlier.

R., Vol. 2, p. 317; (emphasis added). None of the language in the March 26, 2003, correspondence even hints about how Stewart Title may switch its position by falling back on policy language which arguably allowed it to release itself of the appeal by tendering limits under the policy. None of the earlier letters sent by Stewart Title mention anything about it either. If perhaps Stewart Title notified Mortensen in the series of letters that it was reserving the right to tender policy limits in lieu of the appeal, then summary judgment on the issue of unconscionability may have been in order. However, since Stewart Title did not do this, a genuine issue of material fact precludes summary adjudication of this issue as well.

In further illustration of the unconscionability, it may be worth noting that Mortensen bought the property in question in 1994. The issues in the *Akers* litigation did not develop until several years later in 2001. Again, therefore, even if Stewart Title had delivered the policy to Mortensen in the 1994 time frame, to avoid an unconscionable change in position, it clearly would have behooved Stewart Title to deliver another copy when the *Akers* dispute arose in 2001 or, at a minimum, to cite to the language in the policy when sending the multitude of letters to Mortensen guaranteeing him protection on appeal. Whether or not the policy was delivered, Mortensen has shown a genuine issue of fact on each element of the doctrine of quasi-estoppel.

Moreover, a jury could find Stewart Title promised on numerous occasions that it would protect Mortensen on appeal based upon its realization that it created the mess of litigation in which Mortensen found himself. A jury could find that after learning just how big a mess Stewart Title created for Mortensen, it then decided to renege on its promise to handle the appeal. A jury could find Stewart Title waived its right to come

out from underneath the appeal by sending letters to Mortensen without expressly notifying Mortensen it may rely on the right to withdraw and by reserving the right to go in the diametrically opposite direction. The case of *Boise Motor Car Company v. St. Paul Mercury Indemnity Company,* 62 Idaho 438, 448 (1941) demonstrates the point:

> Where the insured refuses to enter into an agreement permitting the insurer to defend with reservations, and communicates to the insurer a denial of the latter's right to so defend with reservation . . . and thereafter the insurer fails to withdraw and continues to represent the insured in defense of the suit, the law is clear that the insurer has waived its right to withdraw, and will be estopped to later assert such a right when sued by the insured for failure to properly defend. (Emphasis added).

That is exactly what happened here. A jury could find it unconscionable for Stewart Title to fall back on a right it had previously waived. Accordingly, summary judgment on this theory should not have been entered against Mortensen.

D. The District Court Erred In Ruling the Claim for Emotional Distress was Time Barred by the Statute of Limitations Contained in Idaho Code § 5-219.

As Stewart Title acknowledged, the claim for infliction of emotional distress arguably involves a continuing tort. *See Memo, pp. 8-9, at R., Vol. 2, pp. 302-303 (citing Curtis v. Firth,* 123 Idaho 598, 604, 850 P.2d 749, 755 (1993)*).* Based upon the facts presented here, it would be reasonable for a jury to find the infliction of emotional distress will, at a minimum, continue until Stewart Title either recommences its efforts to fix the problem in Mortensen's right of access or the underlying Akers' suit reaches its final destination. Due to the continuing nature of the tort involved here, the statute of limitations did not bar Mortensen's pursuit of recovery for emotional distress.

E. The District Court Erred when Ruling Mortensen did not Plead a Breach of Contract for Failure of Stewart Title to Perform Diligently.

This may be the plainest of all errors committed by the district court. In count three of the Complaint, Mortensen included a cause of action for breach of contract. R., Vol. 1, p. 6. Yet, on the motion for reconsideration, the district court ruled:

> Plaintiff urges this Court to reconsider summary judgment for Defendant on Plaintiff's Breach of Contract Claim. Plaintiff argued that a term of the contract in question, under paragraph 4(b) was for defendant, if it exercised its right to take steps to establish title in real property for Plaintiff, to act diligently.
>
> Plaintiff is accurate in describing this particular term of the contract; however Plaintiff did not plead a breach of contract for failure of Defendant to perform diligently. Plaintiff's only breach of contract claim alleges that Defendant failed to defend Plaintiff by prosecuting an appeal of the court's judgment in *Akers v. Mortensen,* Kootenai Co. Civil Case No. 020222.

The Complaint filed by Mortensen adequately placed Stewart Title on notice of Mortensen's claim for breach of contract. The factual allegations contained in paragraphs three (3) through thirty-one (31) specifically describe the lack of diligence on the part of Stewart Title. R., Vol. 1, pp. 2-5. In modern pleading, the "purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff rests the action." *Quinto v. Millwood Forest Products*, 130 Idaho 162, 167 (Ct. App. 1997). The Mortensen Complaint more than satisfies the rules and practice of modern pleading. It was clear error to find otherwise.

F. The District Court Erred by Awarding Attorney Fees to Stewart Title.

The district court erred by finding Mortensen brought suit unreasonably and without foundation and awarding Stewart Title $25,000.00 in attorney fees. R., Vol. 3, pp. 604-605. Mortensen's complaint against Stewart Title was solidly anchored in fact and well grounded in existing Idaho law. The fact the Court ruled unfavorably to Mortensen does not, in and of itself, render the complaint frivolous. Nonetheless, Stewart Title argues the case was frivolous because some of the claims were barred by the statute of limitations. However, the statute of limitations is an affirmative defense and is waived unless asserted and therefore does not make a claim for relief frivolous when, like here, the prima facia elements of the claim are supported by facts. Moreover, Mortensen presented good faith arguments that the applicable statute of limitations in this case had not yet run due to the continuing nature of Stewart Title's wrongful conduct. A non-persuasive argument is not synonymous with a frivolous argument. The award of attorney fees should be reversed and set aside.

G. Attorney Fees on Appeal

Mortensen claims the right to recover attorney fees on appeal pursuant to Idaho Code § 41-1839, I.A.R. 41, and I.A.R. 35(a)(5).

CONCLUSION

Mortensen respectfully seeks a reversal of the district court's order granting summary judgment in favor of Stewart Title.

DATED this 27 day of May, 2009.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I CERTIFY that on the 27 day of May, 2009, I caused a true and correct copy of the foregoing document to be:

☒ mailed ☐ hand delivered ☐ transmitted fax machine to: (509) 444-7872	Todd Reuter, Esq. Kirkpatrick & Lockhart Preston Gates Ellis , L.L.P. 618 W. Riverside Avenue, Suite 300 Spokane, WA 99201-0602

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff